Filed 9/28/15 Lomeli v. Pacific Specialty Ins. Co. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ELVIA LOMELI, Plaintiff and Appellant, v. PACIFIC SPECIALTY INSURANCE COMPANY, Defendant and Appellant.	E061528 (Super.Ct.No. CIVDS1212543) OPINION

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge. Affirmed.

Shoecraft Burton, LLP, Michelle L. Burton and Devin T. Shoecraft for Defendant and Appellant.

Silverberg Law Corporation, Robert Silverberg and James W. Haines for Plaintiff and Appellant.

I

INTRODUCTION

Defendant Pacific Specialty Insurance Company (Pacific) appeals from an order granting a motion for relief from dismissal and a judgment against plaintiff Elvia Lomeli (Lomeli). Lomeli has filed a cross-appeal concerning an earlier order that Pacific's requests for admission be deemed admitted against Lomeli. We hold the trial court did not abuse its discretion in granting only Lomeli's motion for relief and in declining to grant relief from its earlier order that the requests be deemed admitted. We affirm the rulings of the lower court.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. Prejudgment Proceedings

In December 2012, Lomeli filed a complaint against Pacific for breach of an insurance contract and bad faith. Lomeli was represented by Glenn T. Rosen, a California lawyer since 1991.[1] Pacific was Lomeli's homeowner's insurer. Lomeli alleged that Pacific had mishandled her claim for water damages to her home's roof caused by a storm. Pacific filed a general denial.

In May 2013, both parties filed case management conference statements. Pacific also filed a motion to compel discovery responses, set for hearing on July 2, 2013. Rosen

[1] According to the State Bar, Rosen is still practicing.

appeared on behalf of Lomeli at the case management conference on June 7, 2013. On June 25, Pacific filed a notice of Lomeli's nonopposition to the discovery motion.

At the hearing on the discovery motion on July 2, 2013, Rosen appeared for Lomeli and represented to the court that the discovery responses had been prepared without objection and would be verified after Lomeli returned from the July 4th holiday. The court granted the motion and ordered the responses served within 15 days. The court also ordered the requests for admission were deemed admitted because Lomeli had not responded before the hearing date on the discovery motions. (Code Civ. Proc., § 2033.280, subd. (c).)

In August 2013, Pacific filed a motion for terminating sanctions because Lomeli had still not served her discovery responses. On September 3, 2013, Pacific filed a notice of Lomeli's nonopposition. Rosen did not appear at the hearing on September 10, 2013, and the court granted the motion and dismissed the matter with prejudice on September 25, 2013. Judgment was entered on October 21, 2013. Notice of entry of judgment was served on October 29, and filed on October 30, 2013.

B. Motion for Relief from Judgment

On January 13 and 14, 2014, Lomeli executed a substitution of attorney, replacing Rosen with Peter Cho. On April 18, 2014, Lomeli, represented by her new lawyers, Cho and the Silverberg law corporation, filed a motion for relief from judgment on the grounds of fraud, mistake, and Rosen's positive misconduct. (Code Civ. Proc., § 473, subd. (b); *Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 738-

739.) In her motion for relief, Lomeli argued that Rosen's abandonment of her and positive misconduct justified the court exercising its inherent power to grant relief from the dismissal and the judgment. (*Ibid.*) Lomeli offered no argument about the deemed admissions.

Lomeli's supporting declaration states that her primary language is Spanish and she is not fluent in English. She owned a house in Fontana. Water damage to the roof began in 2011 and continued until the roof collapsed in November 2012. In July 2012, Lomeli hired a public adjuster, Gary Baca, to handle her claim and he recommended she retain Rosen to file an action for insurance bad faith. Baca handled the communications for Lomeli with Pacific and Rosen. Rosen did not ask Lomeli "to provide information for written discovery responses or to verify such responses." Lomeli did not take a vacation during the summer of 2013. Lomeli asserted she did not know her case had been dismissed until January 2014.

Gary Baca, the licensed public insurance adjuster, submitted a declaration in which he stated that Lomeli hired him to handle her claim and to communicate with Rosen and Pacific. Baca is fluent in Spanish. Rosen never contacted Baca about having Lomeli respond to or verify written discovery. Lomeli was not on vacation between July and September 2013. Baca frequently called or sent emails to Rosen but Rosen did not answer. In some email exchanges in November and December 2013, Rosen did not discuss the status of Lomeli's case or disclose that it had been dismissed. Instead, Rosen

promised in an email on November 14, 2013, "I owe you a full status report. It's coming." But Rosen never provided a report.

On January 2, 2014, when Baca finally spoke to Rosen on the telephone, Rosen said "the case had been dismissed, but was not very clear on why it had been dismissed. Mr. Rosen only told me that the court has made some kind of error on a motion."

In opposition, Pacific argued the motion was outside the six-month limitations period for relief. (*Rutan v. Summit Sports, Inc.* (1985) 173 Cal.App.3d 965, 970.) After the order of dismissal was entered on September 25, 2013, a timely motion had to be filed by March 25, 2014. At the hearing, the trial court agreed there was no statutory relief because six months had already expired. The trial court also commented about whether Lomeli could establish she had a "meritorious" case. Pacific argued that Lomeli could not show a meritorious claim in light of the July 2, 2013, order finding all requests for admissions deemed admitted: "The effect of granting relief under these circumstances will be that [Pacific] immediately files a motion for summary judgment because [Lomeli's] already admitted that there's no insurance coverage for the claim at issue in this case."

After taking the matter under submission, the trial court granted Lomeli's motion to set aside the judgment. Upon Pacific's request, the court later clarified its order, explaining that the motion for relief "did not address the underlying discovery. It wasn't part of the motion, and it wasn't part of the Court's ruling. So that simply hasn't been decided one way or the other. That's a blank slate. [¶] . . . [¶] . . . That wasn't a part of

[Lomeli's] motion so I never ruled on that." The minute order stated, "[t]he court does not construe the motion for relief to extend to the ruling on the request regarding admissions and no order is issued thereon."

III

DISCUSSION

A. Standard of Review

The appellate court reviews a challenge to a trial court's order granting a motion to set aside a judgment on equitable grounds for an abuse of discretion which exceeds the bounds of reason. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) "[T]he party moving for relief from a judgment has the burden of establishing the basis for relief." (*Parage v. Couedel* (1997) 60 Cal.App.4th 1037, 1041, citing *Rappleyea,* at p. 982.)

Pacific offers several arguments about how the trial court abused its discretion: Lomeli did not establish positive misconduct; Lomeli did not present evidence that she diligently pursued her case and sought relief from the judgment; and Lomeli could not show a meritorious case because the requests for admissions were deemed admitted.

B. Rosen's Positive Misconduct and Lomeli's Diligence

In reviewing the trial court's findings, "We draw upon that legal oxymoron known as 'positive misconduct' to conclude that the negligence of the attorneys shall not be imputed to the client. (See *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892.)" (*Fleming v. Gallegos* (1994) 23 Cal.App.4th 68, 70.) "Positive misconduct is found

where there is a total failure on the part of counsel to represent his client. (See *Carroll v. Abbott Laboratories, Inc., supra*, 32 Cal.3d at p. 900.)" (*Aldrich v. San Fernando Valley Lumber Co., supra,* 170 Cal.App.3d at p. 739.) California courts recognize abandonment by an attorney "'"'where the attorney's neglect is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence.'" (*Carroll, supra*, 32 Cal.3d at p. 898; italics omitted.) . . . [S]uch extreme misconduct '"obliterates the existence of the attorney-client relationship"' (*ibid.,* italics omitted) and for this reason the client has no attorney from whom negligence can be imputed. Various formulations of this exception can be found throughout the *Carroll* opinion. (*Id.* at pp. 898-900.) They all boil down to this: Imputation of the attorney's neglect to the client ceases at the point where 'abandonment of the client appears.' (*Id.* at p. 900.)" (*Seacall Development, Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 Cal.App.4th 201, 205.)

Our analysis of positive misconduct also involves Lomeli's conduct: "Even where abandonment is shown, however, the courts also consider equitable factors in deciding whether the dismissal of an action should be set aside. These factors include the client's own conduct in pursuing and following up the case [(*Aldrich v. San Fernando Valley Lumber Co., supra,* 170 Cal.App.3d at p. 739)], whether the defendant would be prejudiced by allowing the case to proceed [(*Fleming v. Gallegos, supra,* 23 Cal.App.4th at pp. 74-75)] and whether the dismissal was discretionary or mandatory (*Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 394). The courts must also balance the public policy favoring a trial on the merits against the public policies favoring finality of

judgments and disfavoring unreasonable delays in litigation (*id.* at p. 390) and the policy an innocent client should not have to suffer from [her] attorney's gross negligence against the policy a grossly incompetent attorney should not be relieved from the consequences of his or her incompetence. (*Fleming, supra*, 23 Cal.App.4th at p. 75.)" (*Seacall Development Ltd. v. Santa Monica Rent Control Bd., supra,* 73 Cal.App.4th at p. 205.)

Lomeli contends Rosen abandoned her. Pacific contends Rosen may be liable for malpractice but he did not abandon Lomeli. We conclude the record supports the trial court's finding of abandonment and positive misconduct. Rosen took no action to prosecute his client's case after filing the complaint, filing a case management statement, and making one court appearance. Rosen lied to the court, failed to respond to discovery on Lomeli's behalf, and allowed Pacific to obtain a default judgment against her. The register of actions shows that, after July 2, 2013, Rosen did not make any appearances for Lomeli, including not appearing at the hearing on terminating sanctions. According to the declarations submitted by Lomeli and Baca, Rosen stopped communicating with them and lied to them about the status of the case until January 2014. Rosen's false promise to provide a status report actually connotes abandonment: "Assurances of attentive representation was one factor determining the conclusion of attorney abandonment in *Orange Empire Nat. Bank v. Kirk*[(1968)] 259 Cal.App.2d 347, 350, 354." (*Fleming v. Gallegos, supra,* 23 Cal.App.4th at p. 74.)

The reasons for granting relief from the judgment outweigh the reasons for letting it stand. Rosen failed to represent Lomeli in ways similar to other attorneys found to

have abandoned their clients: "In *Daley*, for example, the attorney filed the complaint, filed a memorandum to set the case for trial and signed a stipulation to amend the pleadings (albeit after a lengthy delay). ([*Daley v. County of Butte* (1964) 227 Cal.App.2d 380,] 384-385.) In *Fleming*, the attorney filed the complaint, recorded a lis pendens, answered the cross-complaint and conducted limited discovery. ([*Fleming v. Gallegos*,] *supra*, 23 Cal.App.4th at pp. 70-71.)" (*Seacall Development, Ltd. v. Santa Monica Rent Control Bd.*, *supra*, 73 Cal.App.4th at p. 206.)

The trial court found there was abandonment, reasoning as follows: "[Rosen] was an active member of the bar but basically did nothing, . . . [¶] . . . There was the earlier motion to compel responses at which, at least according to the Plaintiff, [Rosen] affirmatively represented to the Court that the discovery responses had been prepared, had been forwarded to the client for signature on the verifications, when according to the Plaintiff that was a lie." Based on the record, substantial evidence supports the trial court's finding of abandonment and positive misconduct by Rosen.

Furthermore, like the *Seacall* lawyer, it could be said Rosen "substituted [himself] out of the case de facto long before [he] did so de jure." (*Seacall Development, Ltd. v. Santa Monica Rent Control Bd.*, *supra*, 73 Cal.App.4th at p. 206.) Under these circumstances, we cannot penalize Lomeli for any lack of diligence in monitoring her case: "As the court pointed out in *Daley*, the only thing clients generally know about the prosecution of lawsuits is 'that several years frequently elapse between the commencement and trial of lawsuits.' ([*Daley v. County of Butte*, *supra*,] 227

Cal.App.2d at p. 392.)" (*Seacall Development*, at p. 206; *Aldrich v. San Fernando Valley Lumber Co., supra,* 170 Cal.App.3d at pp. 739-740.) Lomeli was not required to "make suspicious inquiries and incessantly check on" her attorney. (*Fleming v. Gallegos, supra,* 23 Cal.App.4th at p. 73, citing *Daley v. County of Butte, supra*, 227 Cal.App.2d at p. 392.) We conclude it was not a failure of diligence for Lomeli to file a motion for relief within three months (January-April 2014) of learning about the dismissal of her case and the default judgment and substituting a new lawyer. (*Orange Empire Nat. Bank v. Kirk, supra,* 259 Cal.App.2d at p. 355; *Seacall,* at pp. 206-207 [client found to have acted diligently even though approximately six months elapsed between notice of default judgment and motion for relief.].)

C. Meritorious Case

The primary obstacle to Lomeli obtaining relief is the question of whether there is any merit to her claims in light of her deemed admissions that Pacific is not liable under the contract. Although the trial court recognized the admissions could undermine Lomeli's claims, it nevertheless found she has a meritorious case.

In her cross-appeal, Lomeli attempts to argue that her April 2014 motion for relief from the September 2013 dismissal, and subsequent judgment, necessarily included a request for relief from the trial court's order of July 2, 2013, deeming the requests for admissions admitted after Lomeli failed to serve any responses. However, Lomeli was still being represented by Rosen when he appeared at the July 2, 2013 hearing.

Therefore, it cannot be plausibly argued that Rosen had abandoned Lomeli by that date and Lomeli cannot claim relief from that order based on positive misconduct.

Lomeli never expressly raised a challenge in the trial court to the July 2, 2013, order. Lomeli's motion for relief, filed in April 2014, did not mention the deemed admissions or seek any relief from their effect on her claims. The parties disagree about whether Lomeli has any viable claims if the deemed admissions ultimately stay in effect. Based on the record on appeal, we cannot predict what will be the outcome in the lower court based on the deemed admissions. As the trial court apparently concluded, Lomeli may still have a meritorious claim against Pacific upon remand. Therefore, we reject the appeals of both parties.

IV

DISPOSITION

We affirm the trial court's orders and order the parties to bear their own costs on appeal.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.